NO. 83-459

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE TRIBES IN OPPOSITION

Susan Kay Hvalsoe
Counsel for Amicus
Curiae Hoh,
Quileute Tribes
Suite 301 Heritage
Federal Savings
and Loan Bldg.
Fifth and Columbia
Olympia, WA 98501
(206) 943-6747

Richard Reich
Counsel for Amicus
Curiae Quinault
Nation
Quinault Legal Office
P. O. Box 189
Taholah, WA 98587
(206) 276-8211

NO. 83-459

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF IN OPPOSITION AS AMICUS CURIAE

Susan Kay Hvalsoe
Counsel for Amicus Curiae Hoh, Quileute Tribes
Suite 301 Heritage Federal Savings and Loan Bldg.
Fifth and Columbia
Olympia, WA 98501
(206) 943-6747

Richard Reich
Counsel for Amicus Curiae Quinault Nation
Quinault Legal Office
P. O. Box 189
Taholah, WA 98587
(206) 276-8211

The Quileute Indian Tribe, the Hoh Indian Tribe and the Quinault Indian Nation respectfully move this Court for leave to file a brief in opposition to the Washington State Charterboat Association's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This motion is based upon the following facts and law.

1. By order of this Court of October 20, 1983, the time for filing the brief in opposition to the petition for writ of certiorari is November 18, 1983.

2. Petitioner seeks to litigate the substance of rights of the movant Quileute, Hoh and Quinault Indian Tribes under the Treaty of Olympia, 12 Stat. 971 (1855). Examination of that interest shows that the tribes are indispensable to the readjudication sought by petitioner.

3. The tribes participated as amicus curiae before the Court of Appeals and the District Court below. Petitioner nevertheless informed counsel for the tribes on November 14, 1983, that it objects to the tribes participation here.

4. The interpretation of the Treaty of Olympia, 12 Stat. 971, and the tribes' substantive rights thereunder, were fully adjudicated in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (1975), cert. denied, 423 U.S. 1086 (1976), substantially aff'd sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), (hereafter "Fishing Vessel Ass'n").

5. In Fishing Vessel Ass'n, the petitioner, together with the tribes, the United States, and the State of Washington, fully participated in this

Court's adjudication of the issues again presented in the Association's petition here.

6. The adjudication petitioner seeks would deprive the moving tribes of their right to catch fish at some of their most important, indeed their homeland, river fishing locations.

7. The non-party tribes and the Secretary would still be bound to the Treaty interpretation and run-by-run allocation decrees of United States v. Washington and Fishing Vessel Ass'n. It is impossible to accord complete relief in the absence of the tribes, and the Secretary should be protected by Rule 19(b)(2)(ii), finding himself in a role comparable to that of the "stake-holder" in Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 75 (1961) who is not to be compelled "to relinquish [the stake] without assurance that he will not be held liable again

. . . in a suit brought by a claimant who is not bound by the first judgment." Here, the non-party tribes can be expected to make demands on the Secretary to enforce the adjudication of their rights in United States v. Washington and Fishing Vessel Ass'n.

8. Because it is clear that the Association seeks to readjudicate and alter the most important treaty secured rights of the moving tribes—their right to fish at their traditional reservation homeland fishing locations—the tribes should be permitted to participate now as amicus curiae.

Respectfully submitted this 16th day of November, 1983.

SUSAN KAY HVALSOE
Counsel for Amicus Curiae Tribes

RICHARD REICH
Counsel for Amicus Curiae Tribes

NO. 83-459

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR AMICUS CURIAE TRIBES IN OPPOSITION

Susan Kay Hvalsoe
Counsel for Amicus
Curiae Tribes
Suite 301 Heritage
Federal Savings
and Loan Bldg.
Fifth and Columbia
Olympia, WA 98501
(206) 943-6747

Richard Reich
Counsel for Amicus
Curiae Tribes
Quinault Legal Office
P. O. Box 189
Taholah, WA 98587
(206) 276-8211

QUESTIONS PRESENTED

1. Whether this petitioner can relitigate matters it presented under a different name in Washington v. Washington State Commercial Passenger Fishing Vessel Association, No. 77-938, 443 U.S. 658 (1979), and whether it is bound by that case.

2. Whether the Court of Appeals erred in determining that the 1854 and 1855 Stevens Treaties between northwest Indian tribes and the United States were not impliedly abrogated by the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA), 16 U.S.C. 1801 et seq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINION BELOW

The Court of Appeals for the Ninth Circuit issued an opinion reported at 702 F.2d 820 (March 29, 1983).

PARTIES

The petitioner represents a group of non-Indian salmon fishing interests which operates charter services in the recreational fishing industry that has been operating off the Washington coast since the early 1950's. It is the very same Association that was before the Court in another case that bears its different name. Washington v. Washington State Commercial Passenger Fishing Vessel Association, No. 77-983, 433 U.S. 658 (1979) ("Fishing Vessel Ass'n" herein). There is no dispute as to this identity as petitioner admits that it uses the names interchangeably. At page 4 of its brief in Fishing Vessel Ass'n, the Association said:

The opening brief of the petitioner State of Washington contained certain facts applicable to the respondent Washington State Commercial Passenger Fishing Vessel Association ("Charterboat Association") in No. 77-983. The Charterboat Association adopts the State of Washington's statement of the case insofar as applicable.

Respondent is the Secretary of Commerce, who regulates the ocean fisheries under the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA).

Appearing as amicus curiae are three federally recognized Indian tribes with fishing rights secured under a treaty with the United States, the Quinault Indian Nation, the Hoh Indian Tribe, and the Quileute Indian Tribe. Each of these tribes has its own separate fishing grounds on the rivers that run through its own separate reservation

homeland on the north Washington coast. [1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case is the third time in five years in which petitioner has come to this Court seeking a different interpretation of the clause in the Stevens Treaties which secured fishing rights to amicus curiae tribes. In 1979 this Court heard the arguments of petitioner (and others) that the interpretation of the Stevens Treaties should be changed from that given by the United States

---

[1] Contrary to petitioner's claim at Petition, p. 5, amicus curiae tribes do not have "coterminous" treaty fishing rights. Each tribe's primary fishing grounds are on the rivers that run through their exclusive and distinct reservations. See map of north Washington coast, Appendix 1.

District and Circuit courts in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (1975), cert. denied, 423 U.S. 1086 (1976), rehearing denied, 424 U.S. 978 (1976), 459 F. Supp. 1020 (1978), aff'd, 573 F.2d 1123 (1978). This Court, however, affirmed the essentials of the District and Circuit courts' formulation of the tribes' rights.

> In our view the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. But our prior decisions provide an even more persuasive reason why this interpretation is not open to question. For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.

Fishing Vessel Ass'n, 443 U.S. at 679 (emphasis added). The Court also considered the Association's claim that these rules should not to apply to the

ocean fisheries. The Court rejected their argument and held instead that the Secretary had a duty to enforce the treaty fishing rights of the Northwest tribes in his regulation of ocean fisheries under the FCMA. Fishing Vessel Ass'n, supra, at 688.

In 1981 amicus curiae tribes sued the Secretary, and the state, to enforce their treaty fishing rights as set forth in Fishing Vessel Ass'n. Petitioner untimely sought intervention to relitigate the underlying interpretation of the treaty, and was denied participation. Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683 (W.D. Wash. 1981). The denial of intervention was affirmed by the Ninth Circuit, which noted that the attempt was a "thinly veiled effort by the Association to relitigate issues that have previously been decided." 676 F.2d 710 (9th Cir. 1982)(memorandum),

cert denied ___ U.S. __, 103 S.Ct. 141, 74 L.Ed2d 120 (1982).

At the same time in 1981 petitioner initiated this separate action against the Secretary to change this Court's interpretation of the Stevens Treaties vis-a-vis the non-Indian ocean fisheries. Petitioner here sought (as it had in Hoh) to replace the "run-by-run" approach with an "aggregate" sharing approach which, although it would disenfranchise some tribes of their traditional fisheries, [2/] would allow the Association's non-Indian members to take a greater share of the total fishery in the ocean.

The District Court heard this case on cross-motions for summary judgment,

---

[2/] For example, in 1981 petitioners formulation of sharing would have denied the Hoh Tribe its fishery all together, while some other tribe would have been allowed a greater catch to maintain an "aggregate" sharing balance.

and granted summary judgment in favor of the Secretary. The Court of Appeals affirmed, 702 F.2d 820, re-stating after discussion of the lengthy and repetitive history of this controversy, that "The run-by-run approach for allocating salmon is required by the Stevens treaties and has not been abrogated by the Magnuson Act." Id, at 824.

ARGUMENT

1. The issues raised are res judicata binding on the Association.

Petitioner litigated both the underlying run-by-run sharing standard and the obligation of the Secretary to manage ocean fisheries under the MFCMA in compliance with the Stevens Treaties in Fishing Vessel Ass'n.

The Association also is bound under the principle of parens patriae by the state's participation and representation

of non-Indian interests in the fisheries, including petitioner and other user group associations, in United States v. Washington, supra, and in Hoh, supra. If this were not the case the state (and for the ocean fisheries the Secretary) would find it impossible to regulate non-Indian fisheries in a way that fairly balances the interests of the newer ocean fishing groups, such as petitioner,with the older non-Indian "inside" fishing groups, such as river sports fisheries, and non-Indian gill net fishermen in Puget Sound and coastal harbors. This Court considered the issue in Fishing Vessel Ass'n, saying that such individuals and associations enjoyed "common public rights as citizens of the state, were represented by the state in those proceedings, and, like it, were bound by the judgment." Fishing Vessel Ass'n, supra at 692,

citing Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-41 (1958).

2. The MFCMA does not abrogate the Stevens Treaties.

Petitioner also argues that the MFCMA impliedly abrogated the Stevens Treaties. The Association's argument is based on its unique interpretation of the "optimum yield" goal under national standard four of the MFCMA. Petitioner argues that fish caught by amicus curiae tribes in their traditional river fisheries, and by other non-Indian groups fishing the "inside" waters of Washington and other states, somehow do not contribute to the "optimum yield".

Aside from the speciousness of this proposition in its own terms, it ignores the statutory mandate that each fishery management plan of the Secretary shall be consistent with all provisions of the act and with any other applicable law.

16 U.S.C. 1853(a)(1). There is no legislative history which suggests that Congress intended to omit the Stevens Treaties and the federal court decisions interpreting them from the "other law" provision of the Act, and this Court has consistently held that a very clear expression of Congressional intent is required in order to find an abrogation. Menominee Tribe v. United States, 391 U.S. 404 (1968). Moreover, this Court has already decided that the MFCMA requires the Secretary to regulate the ocean to comply with Indian tribes' fishing rights under the treaties. Fishing Vessel Ass'n, supra, at 688.

3. Petitioner has suffered no injustice.

Petitioner has not suffered from the enforcement of amicus curiae tribes rights under the Stevens Treaties.

In 1981, the year for which petitioners brought this case, there was no reduction in petitioner's fishery as a result of the enforcement of amicus curiae tribes' fishing rights by the District Court in Hoh. Instead, they exceeded the catch allocation set for them before Hoh was brought by some 18,000 fish. The tribes' rights were implemented by moderating the state's overly restrictive spawning escapement goals and directing the tribes, the Secretary and the state to develop a plan for the long-term management of the affected fisheries. Hoh, supra, at 690, 692.

Moreover, this year the Secretary provided a larger share of the ocean fishery to the Association. Petitioner and similarly situated recreational

fishing interests were allowed 66% of the ocean catch compared to their historic 40% share. The Secretary's decision was upheld in a case in which petitioner participated. Washington Troller's v. Baldrige and Washington State Charterboat Ass'n, No. C83-753R, in the Western District of Washington, memorandum judgment, August 17, 1983.

There simply is no injustice here that commands another review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SUSAN KAY HVALSOE

RICHARD REICH
Counsel for Amicus Curiae
Tribes


VANCOUVER ISLAND
STRAIGHT OF JUAN DE FUCA
LUMMI
Bellingh
SWIN
MAKAH
Lake Ozette
Ozette R.
Hoko R.
Quillayute River System
ELWHA
Port Angeles
Puget Soun
Elwha River
Dungeness R.
QUILEUTE
PORT GAMBLE
PACIFIC OCEAN
Hoh River
HOH
Queets River
Quinault R.
Duckabush R.
QUINAULT
Skokomish R.
Hamma Hamma R.
SKOKOMISH
Tahuya
PUYA
SQUAXON ISLAND
Tacoma
Aberdeen
Chehalis R.
NISQUALLY
Olympia
Deschutes R.

APPENDIX I